Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

WAYTEC ELECTRONICS CORPORAITON,
Petitioner,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 25, 2008

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QUESTIONS PRESENTED

I. Where a Plaintiff Timely Moves to Remand a Case Based Upon Defendants' Failure to Comply With Mandatory Requirements of the Removal Statutes, and the Defect Cannot Be Cured, Do *Caterpillar v. Lewis*, 519 U.S. 61 (1996) and *Grupo Dataflux v. Atlas Global, L.P*, 541 U.S. 567 (2004), Compel or Permit an Appellate Court to Ignore the Defective Removal, in the Interest of Judicial Economy, Such That the Preserved Objection Will Not Be Considered on Appeal Once the Case Has Proceeded to Final Judgment?

II. Whether the Defendants Failed to Comply With the Mandatory Requirement of 28 U.S.C. § 1446 That a Notice of Removal Must Be Filed and Signed by Each Defendant Within Thirty Days of Receipt of Service?

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

Plaintiff-Appellant and Petitioner:
Waytec Electronics Corporation.

Defendants-Appellees and Respondents:
Rohm and Haas Electronic Materials, LLC; Northern Laminate Sales, Incorporated, d/b/a NLS Technologies.

RULE 29.6 STATEMENT

Waytec Electronics Corporation is not a publicly held corporation and has no parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Waytec Electronics Corporation ("Waytec") respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

The Fourth Circuit refused to consider whether defendants failed to comply with the statutory requirements for removal set forth in 28 U.S.C. § 1446, stating that *Caterpillar v. Lewis*, 519 U.S. 61 (1996), dictates that once final judgment has been entered in a diversity case where subject matter jurisdiction exists, notions of judicial efficiency and economy preclude any consideration of remand to State Court even if removal was improper under the governing statute. (App. 7a-8a.) The objection to removal here was timely – and fully preserved. (App. 66a-74a, 77a-89a, 96a-101a.)

Congress imposed *mandatory* requirements for removing cases filed in State Court to Federal Court. 28 U.S.C. § 1446. The Fourth Circuit below ruled that failure to comply with these statutory mandates can be disregarded once judgment is entered. (App. 8a.) ("The asserted procedural error . . . does not overcome the 'considerations of finality, efficiency, and economy' held by the Supreme Court to be paramount. *See Caterpillar,* 519 U.S. at 75.") The Fourth Circuit's analysis is squarely at odds with the precedent of this Court, violates Congressional pronouncements regarding removal requirements, and runs counter to the fundamental precept that "Federal courts are

courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).

Numerous Courts of Appeals, like the Fourth Circuit, interpret *Caterpillar* to hold that preserved objections to statutory removal defects are moot once final judgment is obtained in a diversity case. (App. 8a.)[1] These post-*Caterpillar* decisions uniformly reject this Court's precedent holding that federal removal requirements must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Despite this Court's admonition in *Grupo Dataflux v. Atlas Global, L.P.*, 541 U.S. 567, 572-74 (2004) that *Caterpillar* "broke no new ground" and was not a sea-change with regard to removal jurisprudence, the

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[1] *See e.g., Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998) (remand based on procedural failure to file notice of removal within thirty days of service "would be an empty formality" in light of *Caterpillar*); *Huffman v. Saul Holdings L.P.*, 194 F.3d 1072, 1080 (10th Cir. 1999) ("a defect in removal procedure does not warrant a remand to state court if subject matter jurisdiction existed at the time" of judgment); *Wiltz v. Middlexex County Off. of the Prosecutor*, 2007 WL 2717862 (3rd Cir. 2007) ("although appellant raised a likely meritorious objection to removal," based on failure to file removal notice within thirty days, *Caterpillar* dictates upholding jurisdiction where notice ultimately was filed long after statutory thirty-day period); *Gentek Building Prods. v. Steel Peel Litig. Trust*, 491 F.3d 320, 327 (6th Cir. 2007) (if diversity case continues to final judgment, no remand even if removal was improper); *Aqualon Co. v. MAC Equip., Inc.*, 149 F.3d 262, 264-65 (4th Cir. 1998) (once improperly removed case proceeds to final judgment, *Caterpillar* compels leaving judgment in place if subject matter jurisdiction exists at judgment).

Courts of Appeals have read *Caterpillar* as a signal that they now must sacrifice Congressionally-imposed removal requirements on the altar of "judicial economy." This Court should resolve this important conflict involving the scope of federal jurisdiction.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is dated November 28, 2007. (App. 1a-11a.) Waytec timely filed a petition for rehearing and suggestion for rehearing *en banc* that was denied on December 28, 2007. A corrected order denying rehearing was issued on January 24, 2008. (App. 48a-51a.) The District Court's decision denying remand, dated September 2, 2005, is unreported (App. 15a-21a), and its final order granting summary judgment, dated October 25, 2006 (App. 22a-47a), is reported at 459 F. Supp. 2d 480 (W.D. Va. 2007).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 28, 2007. (App. 12a.) A Petition for Rehearing and Suggestion for Rehearing *En Banc* was timely filed and was denied by an Order dated December 28, 2007, and by a corrected order dated January 24, 2008. (App. 48a-51a.) This petition has been filed within ninety days of the denial of rehearing. Sup. Ct. R. 13.1 and 13.3.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The basis of the petition,

however, is that federal jurisdiction was never properly established below based on defendants' failure to comply with the statutory requirements for removal jurisdiction contained in 28 U.S.C. § 1446. Federal jurisdiction in the District Court was asserted under 28 U.S.C. § 1332(a), diversity jurisdiction, and in the Fourth Cirucit under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441 – Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

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28 U.S.C. § 1446 – Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has

become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

***

28 U.S.C. § 1447 – Procedure after removal generally

***

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE AND BACKGROUND JURISDICTIONAL FACTS

Waytec filed its Motion for Judgment against defendants Rohm and Haas Electronic Materials, LLC ("RHEM") and Northern Laminate Sales, Inc. ("NLS") in the Circuit Court for the City of Lynchburg, Virginia, on June 1, 2005, alleging fraud and other state law claims. RHEM was served with process on June 7, 2005. NLS was served with process effective June 20, 2005. (App. 89a, fold-out exhibits A and B.) On June 29, 2005, RHEM electronically filed a Notice of Removal in Federal Court alleging diversity as the basis for federal jurisdiction. (App. 52a.) NLS was not a party to this Notice; it was not signed by any representative of NLS or by counsel for NLS, nor did it show any consent to the removal by or on behalf of NLS.

The District Court *sua sponte* issued an Order and Opinion on July 20, 2005, identifying several deficiencies in the Notice of Removal filed by RHEM, including the fact that defendant NLS had not joined in the removal. (App. 56a.) The Court's Order, on its face, gave the defendants fourteen days from that date to show cause "why this action should not be dismissed for lack of subject matter jurisdiction." (App. 59a.)

Prodded into action by this notice, that same day, July 20, 2005 – the last day a timely removal notice could be filed by NLS (RHEM's thirty days having already long since expired) – counsel for ***RHEM*** electronically filed a "Joint Notice of Removal" purporting to be from both defendants. (App. 61a-65a.) It is undisputed that counsel for RHEM signed

the Notice for NLS's counsel. (App. 116a-118a.) The document was electronically filed by counsel for RHEM through the use of that counsel's login identification and password.[2]

After Waytec filed an Objection to the "Joint Notice of Removal" and a timely Motion to Remand, counsel for NLS electronically filed a second "Joint Notice of Removal" that he signed and filed through the use of his own login identification and password. This "Joint Notice of Removal" was filed on July 27, 2005, thirty-seven days after service of process on NLS. (App. 90a-95a.) Waytec timely objected to this late "Joint Notice of Removal" and renewed its Motion to Remand. (App. 96a-103a, 77a-87a.)

The jurisdictional issue in this case turns on a simple undisputed fact: NLS did not file or sign a removal notice, or a consent to removal, within thirty days of service upon it. The "Joint Notice of Removal" filed with the Court on July 20, 2005, was filed by RHEM, and the typewritten signature of counsel for NLS was affixed by counsel for RHEM – not by counsel for NLS. Under substantial existing case law, counsel for one party cannot sign a removal notice for another party, thus rendering the Notice defective and the removal improper. *Infra* at Argument II. RHEM, also,

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[2] Waytec promptly objected that RHEM's counsel could not sign on behalf of NLS – and that RHEM, in any event, failed to comply with applicable rules for the electronic filing of documents containing multiple attorney signatures. (App. 67a-71a, 81a-85a.) Waytec also objected that NLS's ultimate filing was untimely. (App. 97a-100a.)

filed this defective "Joint Notice" long after the expiration of its thirty-day limit for filing under 28 U.S.C. § 1446. The District Court, however, ruled that RHEM's "Joint Notice of Removal" was acceptable and denied remand. (App. 15a-21a.) That Court later granted summary judgment against Waytec on the merits. (App. 22a.)

The Fourth Circuit ruled that it would not even address the preserved claim that federal jurisdiction was never properly invoked because such a claim "does not overcome the 'considerations of finality, efficiency, and economy' held by the Supreme Court to be paramount" in *Caterpillar:*

> We have held that failure of all defendants to properly join in removal proceedings is merely a procedural defect, not a jurisdictional one. *See Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 203 (4th Cir. 2006). The asserted procedural error in this case, which arises from NLS's failure to file its own notice of removal and Rohm and Haas' failure to file an electronic joint notice of removal containing the signatures of both defendants, does not overcome the "considerations of finality, efficiency, and economy" held by the Supreme Court to be paramount. *See Caterpillar*, 519 U.S. at 75. ***Such error, if it exists, does not supply sufficient grounds to vacate the judgment of the district court and remand this case to state court.*** *See id.* at 77.

(App. 8a, emphasis added.) Waytec's Petition for Rehearing was denied. (App. 48a-51a.)

Here, because of the statutory removal defect, federal jurisdiction was never properly invoked. Unlike the diversity defect in *Caterpillar*, which was cured by dismissal of the non-diverse defendant and fell within a longstanding exception, the defect here (failing to comply with the thirty-day deadline for filing a notice of removal) is uncured and incurable.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve the Confusion in Federal Decisions Regarding Whether Preserved Objections to Statutory Removal Defects Are Rendered Moot Under *Caterpillar* as Long as Subject Matter Jurisdiction Exists When Final Judgment is Entered.

The Fourth Circuit's conclusion that a properly preserved objection to statutory removal defects does not merit reversal (or even review) is at odds with the holdings of this Court. This logic is also contrary to Congressional directives regarding removal and with the concept of limited federal jurisdiction. "It has never been the rule that federal courts, whose jurisdiction is created and limited by statute . . . acquire power by adverse possession." *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 839 (1989) (Kennedy, J., dissenting). The Fourth Circuit's holding that Federal Courts can decide cases never properly placed before them cannot be squared with well-settled doctrines limiting the exercise of federal jurisdiction.

A. Where Waytec Timely Objected to Statutory Defects in Removal, Requiring Remand, The Fourth Circuit Should Not Be Permitted to Openly Ignore the Governing Statute.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute," *Id.; Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). It is presumed that a case lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 U.S (4 Dall.) 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936). This is particularly so in the realm of removal statutes. As this Court held in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941), federal removal statutes should be ***strictly*** construed:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the ***strict construction*** of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the

> Constitution. ***'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'***

(Emphasis added) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

This limitation is derived in part out of respect for state sovereignty, but also from the awareness that Congress has the constitutional authority to define the jurisdiction of the lower federal courts, *Finley v. United States*, 490 U.S. 545, 548 (1989), and, once the lines are drawn, "limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *see also Bowles v. Russell*, __ U.S. __, 127 S.Ct. 2360, 2365 (2007) ("Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.")[3]

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[3] The founders were acutely aware of the danger that Federal Courts might exceed legislative limits on jurisdiction through fictions and collusions – a practice not uncommon in English equity courts. *See e.g.*, Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1832-33 & 1879 (2007); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?* 95 NW. U. L. REV. 1207, 1258-63 (2001) (English equity courts' historic practice of aggrandizing their jurisdiction could provide a legitimate basis of concern regarding usurpation of state jurisdiction by Federal Courts).

"The right of removal is entirely a creature of statute and a suit commenced in state court must remain there until cause is shown for its transfer under some act of Congress." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); *see also Great Northern R. Co. v. Alexander*, 246 U.S. 276, 280 (1918). Yet the Fourth Circuit's ruling here eviscerates the thirty-day filing limitation of 28 U.S.C. § 1446, and then seeks to justify the result by characterizing the violated statutory requirement as merely "procedural." (App. 8a.) In so doing, the Court fails to recognize that, in the area of removal jurisdiction, "procedure" and subject matter jurisdiction are intimately intertwined. *See Greenwood v. Peacock*, 384 U.S. 808, 833 (1966) ("Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.")

28 U.S.C. § 1446 plainly states that a defendant desiring to remove a civil action from State Court to Federal Court "*shall* file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." §1446(a) (emphasis added). The notice "*shall* be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." § 1446(b) (emphasis added). Neither the Fourth Circuit nor the District Court was at liberty to disregard this mandatory language. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use

of a mandatory 'shall' . . . to impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.") As this Court has recently reminded, statutory time limits, even if not denominated as "jurisdictional," have jurisdictional significance. *Bowles v. Russell*, __ U.S. __, 127 S.Ct. 2360, 2365 (2007).

In order for the Federal District Court to acquire jurisdiction over Waytec's case by removal – and to oust the Virginia State Court of jurisdiction – defendants were required to comply with the mandatory provisions of the removal statutes. *Shamrock Oil,* 313 U.S. at 108-09; *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245 (1900) (all defendants must join in petition for removal); *Gerling v. Baltimore & Ohio R. Co.*, 151 U.S. 673, 687 (1894) (if a notice of removal is not timely filed, and a timely objection is raised by the plaintiff, the appellate court should reverse "with directions to remand the case to the state court."). When defendant NLS failed to file or sign a valid notice of removal, or a valid consent to removal, within thirty days of service upon it, the Federal District Court forever lost its opportunity to exercise jurisdiction. 28 U.S.C. § 1446. As a result, the Federal District Court no more had jurisdiction over this case than it would if no defendant had sought removal. The fact that the case met the technical requirements for diversity jurisdiction provided nothing more than the ***opportunity*** for a Federal Court to exercise jurisdiction. Proper and timely removal, in compliance with statutory mandates, was the necessary

prerequisite for a Federal Court to exercise jurisdiction. Here, that necessary prerequisite was wholly lacking. *See Syngenta,* 537 U.S. at 32; *Gerling,* 151 U.S. at 687.

B. Exceptions to Non-Compliance with Removal Requirements Are Grounded in Doctrines of Waiver or "Cured Defects." No Such Exceptions Are Applicable Here.

The Fourth Circuit's holding that judicial efficiency requires Federal Courts to ignore such "technical" matters as statutory compliance is an incorrect analysis of *Caterpillar* and this Court's precedent. Although a procedural defect in removing a case can be waived by the plaintiff, where it is ***not*** waived it is no less mandatory. Congress requires strict compliance with 28 U.S.C. § 1446.

Nothing in *Caterpillar* or *Grupo* suggests that a preserved objection involving an incurable jurisdictional defect can be absolved in the interest of judicial economy. The Fourth Circuit's ruling effectively writes the "mandatory" thirty-day requirement out of 28 U.S.C. § 1446, since (a) it need not be followed, and (b) a violation can never be reviewed on appeal. The requirement is "moot" in the name of judicial economy by the time the case is tried to conclusion. Ironically, this "mootness" rationale directly contradicts *Caterpillar* (the case upon which the Fourth Circuit purports to rely). Under *Caterpillar,* contrary to the mootness ruling below, Waytec "by timely moving for remand, did all that was required to preserve [its] objection to removal. An order denying a motion to remand, 'standing alone,' is

'[o]bviously . . . not final and [immediately] appealable' as of right. Nor is a plaintiff required to seek permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) in order to avoid waiving whatever ultimate appeal right he may have." *Caterpillar*, 519 U.S. at 74 (quoting *Chicago, R. I. & P. R. Co. v. Stude*, 346 U.S. 574, 578 (1954)) (footnotes omitted).

Moreover, this Court has ensured judicial economy by holding that removal statutes must be strictly construed and that any uncertainty as to the propriety of removal must be resolved against the removing party. *Shamrock Oil,* 313 U.S. at 108-09; *McNutt,* 298 U.S. at 182-83. Had that admonition of strict construction been adhered to below there would be no "judicial economy" concerns in this case. Instead, the removal statute was not adhered to, the District Court wrongly refused to remand, and both the District Court and the Fourth Circuit wrongly proceeded to determine the merits of a case never properly removed from State Court.

1. Other Courts have Misinterpreted *Caterpillar* and *Grupo,* Creating A Conflict with This Court's Decisions and the Plain Language of the Removal Statutes.

The Fourth Circuit's ruling is not an isolated decision. In *Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998), the Ninth Circuit similarly concluded that, although a defendant had failed to join in the removal notice until two months after service, the non-compliance must be excused under *Caterpillar*. *See also Wiltz v. Middlesex Co. Off. of the Prosecutor*, 2007

WL 2717862 (3rd Cir. 2007) (rejecting a preserved error regarding failure of all defendants to join a removal notice, concluding that "by actively litigating the case in federal court, those defendants who did not initially sign the notice of removal consented to the authority of the forum and implicitly endorsed removal"); *Huffman v. Saul Holdings*, 194 F.3d 1072 (10th Cir. 1999) (untimely removal notice irrelevant under *Caterpillar*); *Gentek Building Prods. v. Steel Peel Litig. Trust*, 491 F.3d 320, 327 (6th Cir. 2007) (if diversity case continues to final judgment, no remand even if removal was improper). In *Parrino*, the dissent aptly observed:

> It seems to me that extending *Caterpillar* to this case simply elides the procedures set forth in § 1446 and replaces them with a rule that the district court may, in its discretion, decline to remand when those procedures are not complied with. I cannot agree with that reading of the statute or of *Caterpillar*. I do not believe that reading is, in the long run, designed to enhance economy or efficiency. It is designed to enhance interference with state court proceedings, district court amendment of the removal statutes, and unnecessary appeals.

146 F.3d at 707 (Fernandez, J., dissenting).

There exists an obvious tension between the interpretation of *Caterpillar* embraced by the Circuit Courts of Appeals and this Court's precedent holding that removal statutes must be strictly construed, *Shamrock Oil*, 313 U.S. at 1308-09, and that "[n]either the convenience of the litigants nor considerations of

judicial economy can suffice to justify extension" of federal jurisdiction beyond its prescribed limits. *Owen*, 437 U.S. at 377; *Kokkonen*, 511 U.S. at 377. This Court should resolve this conflict.

2. This Court's Decisions Declining to Review Orders Denying Remand are Grounded in Doctrines of Waiver and "Cured" Defects.

Federal Courts, in weighing removal issues, historically encountered the problem of litigants who failed to raise any objections to removal jurisdiction until they lost their case. For example, in *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972), this Court made clear that after removal where a case is tried on the merits ***without objection*** and the Federal Court enters final judgment, the issue on appeal is not whether the case was properly removed, but whether the Federal District Court would have had original jurisdiction of the case had it been filed in that court. In some instances, the party complaining about jurisdiction after judgment actually had chosen the federal forum in the first place and such sleight-of-hand was deemed impermissible. *Baggs v. Martin*, 179 U.S. 206 (1900); *Mackay v. Uinta Dev. Co.*, 229 U.S. 173 (1913). Although this Court clarified that parties cannot waive or forfeit objections to subject matter jurisdiction (and that courts have the independent obligation of ascertaining its existence, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)), it has also long been established that parties who waive objection to statutory removal defects will be prevented from profiting from the tactic. *See e.g.*,

Carter v. Bennett, 56 U.S. (15 How.) 354, 357 (1853); *Mackay*, 229 U.S. at 176; *Grubbs*, 405 U.S. at 702.

Where the jurisdictional problem involves a lack of federal subject matter jurisdiction, a reviewing court has no option but to remand to State Court and waiver concepts are irrelevant. But where the jurisdictional problem involves a statutory defect, and subject matter jurisdiction otherwise exists, courts have recognized that waiver is applicable. Thus, where subject matter exists at judgment ***and*** objection to statutory defects has been waived, the courts have prevented a litigant from "sandbagging" and raising an objection to the defect for the first time after losing the case.[4] No such waiver-based justifications for denying remand are present here.

3. Waytec Did Not Waive Compliance With The Mandatory Thirty-Day Limit of 28 U.S.C. § 1446(b).

The history of removal cases applying waiver principles to untimely objections regarding jurisdictional defects is ample. *See e.g., Grubbs*, 405 U.S. at 702; *French v. Hay*, 89 U.S. (22 Wall.) 238, 244-45 (1874); *Ayers v. Watson*, 113 U.S. 594 (1885); *Bailey v. Texas Co.*, 47 F.2d 153, 155 (2d Cir. 1931) (Hand, J.). Nowhere in this Court's jurisprudence, however, is it stated that a properly preserved objection to a

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[4] In fact, Congress itself has now prevented such tactics by enacting a thirty-day limitation for a plaintiff to file objections to removal on grounds other than lack of subject matter jurisdiction. 28 U.S.C. § 1447(c).

statutory defect can be ignored or that Federal Courts enjoy "default jurisdiction" over cases wrongly wrested from State Courts where a timely objection was lodged below. To the contrary, *Shamrock Oil* requires that compliance with Congress' statutory mandates be strictly construed, 313 U.S. at 108-09, and *Gerling* clarifies that a properly preserved statutory objection to removal should result in remand. 151 U.S. at 687; *see also Edrington v. Jefferson*, 111 U.S. 770, 775 (1884); *Baltimore & R.O. Co. v. Burns*, 124 U.S. 165, 166 (1888).

The Fourth Circuit read *Caterpillar* to grant Federal Courts *carte blanche* to ignore statutory removal defects. However, this Court in *Grupo* admonished that *Caterpillar* ***does not*** stand for the proposition that all removal defects are automatically cured so long as the District Court merely possesses subject matter jurisdiction at the time final judgment is entered. In *Grupo*, Justice Scalia distinguished *Caterpillar* by pointing out that, "*Caterpillar* broke no new ground, because the jurisdictional defect it addressed had been cured by the dismissal of the party that had destroyed diversity. That method of curing a jurisdictional defect had long been an exception to the time-of-filing rule." *Id.*[5] Put another way, in

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[5] Explaining that the Federal Courts adhere to the "time-of-filing" rule utilized in *Caterpillar* for determining whether there is subject matter jurisdiction, Justice Scalia pointed out that, "We have adhered to the time-of-filing rule regardless of the costs it imposes." *Grupo*, 541 U.S. at 571. He further noted that, "[H]olding that "finality, efficiency, and judicial economy" can justify suspension of the time-of-filing rule would create an exception of indeterminate scope. *Id.* at 575.

Caterpillar the initial presence of the diversity-destroying defendant was curable under a well-settled exception by which the Federal District Courts could dismiss the non-diverse defendant and retain jurisdiction over the case. *Grupo*, 541 U.S. at 574. Read in light of *Grupo*, *Caterpillar's* reference to considerations of "finality, efficiency, and economy" is properly understood to mean that once a diversity case has proceeded to final judgment, the appellate court will not unnecessarily remand the case to State Court if there is a recognized exception permitting the District Court to cure the defect and thereby exercise federal jurisdiction.

By contrast to *Caterpillar*, here, the statutory defect is uncured and incurable. No time-honored exception to the "time-of-filing" rule applies to this case; nor do sandbagging or waiver principles apply. Instead, it is a preserved error to the violation of a statutory time limit that is required to be strictly construed. *Caterpillar*, 519 U.S. at 74; *Shamrock Oil*, 313 U.S. at 108-09. This case should be remanded to State Court because there was never any proper removal to Federal Court, and no waiver principles apply to excuse defendants' lack of statutory compliance.

C. Nothing in the Removal Statutes Supports Denying Review of a Decision Erroneously Denying Remand.

28 U.S.C. § 1447(d) provides that, "An order *remanding* a case to the State court from which it was removed is not reviewable on appeal or otherwise." (Emphasis added.) There is no reason to suppose that

Congress, in enacting this provision, meant also to say that an order *denying remand* of a case to State Court is not reviewable. Indeed, the logical inference from the statutory language is to the contrary. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (*"Expressio unius est exclusio alterius."*); N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 47.24 (6th ed. 2000) (under the doctrine of *expressio unius est exclusio alterius* "when people say one thing, they do not mean something else.").

This Court has further held that 28 U.S.C. § 1447(d) does not bar review of an order remanding a case in all instances. Rather, appellate courts can still review a remand order if the remand is based on grounds not authorized under the removal statutes. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 349-51 (1976). If an improperly *remanded* case is reviewable – despite the language of 28 U.S.C. § 1447(d) – then surely so is an improperly *removed* case. As this Court has cautioned, Congress did not "extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron*, 423 U.S. at 351. Similarly, Congress did not give District Courts authority to ignore the statutory time limit for filing a removal notice.[6]

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[6] It would be an ironic and anomalous outcome if the Fourth Circuit's interpretation of *Caterpillar* were to prevail. District Court orders erroneously remanding cases would be reviewable in

Insulating erroneous refusals to remand from appellate review furthers no legitimate end. Rather, it can only encourage defendants to remove cases, even after the statutory deadline has passed, in the hopes that a District Court will ignore or excuse the statutory violation. This Court has made clear that such efforts should be discouraged. *See Grupo*, 541 U.S. at 580-581 ("the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hopes of further new exceptions in the future"). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring) (where jurisdiction is involved, "[v]ague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits."); *Grubbs*, 405 U.S. at 705 ("[T]he removal statutes...are intended to have uniform nationwide application.").

Because the Circuit Courts uniformly are misapplying *Caterpillar* in a way that contradicts both

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certain circumstances, despite 28 U.S.C. § 1447(d)'s apparent prohibition. Yet a District Court order improperly *rejecting* remand would become functionally unappealable upon final judgment under the mantra of "judicial economy" (except for defects in subject matter jurisdiction that the parties need not raise or preserve under 28 U.S.C. § 1447(c)). This result not only conflicts with 28 U.S.C. § 1447(d)'s plain language, but it is also directly at odds with *Caterpillar's* holding that orders denying remand are not immediately appealable and that a timely motion to remand raising defects in removal is all a plaintiff must make to preserve its appeal. *Caterpillar*, 519 U.S. at 74.

Congress' clear language and the precedent of this Court, this Petition should be granted.

II. The Defendants Failed to Comply with the Mandatory Requirement of 28 U.S.C. § 1446 that a Notice of Removal Must Be Filed and Signed by Each Defendant Within Thirty Days of Receipt of Service.

This Petition also raises the question of whether (and under what circumstances) counsel for one defendant may sign and file a removal notice for another defendant who is independently represented by separate counsel. The governing statute requires all defendants who have been served or otherwise properly joined in the state court action to join in the removal by signing a notice of removal within thirty days of formal service of state court process, or by filing a pleading or other paper evidencing that defendant's unambiguous consent to the removal. 28 U.S.C. § 1446(a); *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. at 248 (all defendants must join in petition for removal); WRIGHT & MILLER, 14 C FED. PRAC. & PROC. JURIS. 3d § 3731 (2006); *see Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999) (establishing that thirty-day limit runs from formal service of process).

Case law and governing rules establish that one party may not properly file or sign a removal notice for another represented party. *See e.g., Business Guides, Inc. v. Chromatic Comm. Enter., Inc.*, 498 U.S. 533, 542, 546 (1991) (noting Rule 11 requires that, where a party is represented by counsel, that counsel must sign pleadings or other papers filed with the Court;

obligation placed on individual affixing signature to document); *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 508-09 (E.D. Va. 1992) (holding that under Rule 11 party could not voice consent to removal through another party's attorney).[7]

Here, there was no removal notice that was signed or filed by NLS within thirty days of service upon it.

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[7] *See e.g., Green v. Target Stores, Inc.*, 305 F. Supp. 2d 448, 450-51 (E.D. Pa. 2004) ("one defendant may not speak for the other"); *Masters v. Chapin Mfg. Co.*, 520 F. Supp. 1066 (D. Ky. 1981) (cannot add previously non-consenting defendants after thirty days); *Lampkin v. Media General, Inc.*, 302 F. Supp. 2d 1293 (M.D. Ala. 2004) (parent corporation's consent does not constitute subsidiary's consent even when parties represented by same counsel); *Local Union No. 172 Int'l Ass'n of Bridge, Structural Ornamental Reinforcing Ironworkers v. P.J. Dick, Inc.*, 253 F. Supp. 2d 1022, 1025-26 (S.D. Ohio 2003) (Rule 11 does not authorize one party to make representations or file pleadings on behalf of another; each attorney of record must act for individual defendant); *Amteco Inc. v. BWAY Corp.*, 241 F. Supp. 2d 1028 (E.D. Mo. 2003) (corporation's consent must come from its own lawyer who has entered appearance in case); *Dorsey v. Borg-Warner Auto., Inc.*, 218 F. Supp. 2d 817, 819-20 (S.D.W.Va. 2002) (removing defendant could not sign for "tagalong" defendants); *Henderson v. Holmes*, 920 F. Supp. 1184, 1187 (D. Kan. 1996) (each party must independently and unambiguously file notice of consent within thirty-day period); *Martin Oil Co. v. Philadelphia Life Ins. Co.*, 827 F. Supp. 1236, 1238 n. 3, 1239 (N.D. W.Va. 1993) ("counsel may not voice consent through another attorney"); *but see Harper v. AutoAlliance Intern., Inc.*, 392 F.3d 195 (6th Cir. 2004) (excusing failure of defendant to join removal notice); *Pritchett v. Cottrell*, __ F.3d __, 2008 WL 183348 (8th Cir. 2008) (counsel for one defendant can append consent letter from other defendant to motion for removal).

RHEM, served on June 7, 2005, filed an initial Notice of Removal for itself only. (App. 52a.) NLS, served on June 20, 2005, had not filed any notice or pleading with the court evidencing its consent to removal as of the morning of July 20, 2005 – the last day removal was possible. Later that same day – forty-three days after it was served with process – RHEM electronically filed a second, purportedly "joint" Notice of Removal. (App. 61a.) It is undisputed this "Joint Notice" was signed by counsel for RHEM by affixing a typewritten signature mark for NLS's counsel on the document. (App. 116a-117a.) Waytec objected and moved to remand because RHEM's actions failed to comport with the governing statutes or local rules. (App. 66a-72a, 77a-87a.) NLS then filed its own Notice of Removal, signed by its counsel, on July 27, 2005 (App. 90a) – well after the expiration of the statutory thirty-day period. Again, Waytec timely objected and renewed its motion to remand based on this late filing. (App. 96a.)

The defendants did not comply with the mandatory thirty-day limitation of 28 U.S.C. § 1446(b). NLS's late filing on its own behalf, thirty-seven days after it was served, could not effect removal if Waytec timely objected and moved to remand – as it did. RHEM's effort to cure the statutory non-compliance by filing its "Joint Notice of Removal" purporting to show the consent of NLS was also ineffective because one defendant may ***not*** validly sign a notice of removal for a co-defendant represented by separate counsel (and certainly may not do so forty-three days after being served).

Defendants suggested below that the introduction of electronic filing and the use of "electronic signatures" rendered all prior "signature" cases distinguishable. (*See* fn. 7, *supra.*) Yet the language of the statute and the governing case law establish that the failure of NLS's counsel to sign the document is dispositive; whether the signature is by handwriting or electronic means should be irrelevant.[8] In any event, even if the District Court's administrative procedures for electronic filing could trump the requirements at 28 U.S.C. § 1446,[9] RHEM did not comply with those procedures. The Western District of Virginia's published administrative procedures establish a two-part requirement for electronically filing a document requiring multiple attorney signatures. (App. 123a-128a.) First, "[t]he filing party or attorney must initially confirm that the content of the document is acceptable to all attorneys required to sign the document," and second, "[t]he filing party or attorney . . . must *obtain the signatures of all attorneys on the document*. For purposes of this rule, physical, facsimile, or electronic signatures are permitted."[10]

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[8] Counsel for RHEM did sign for NLS's counsel in ink on the copy of the "Joint Notice of Removal" sent to the State Court. (App. 76a, fold-out exhibits.)

[9] It is well-settled that local rules cannot contravene the requirements of a federal statute. 28 U.S.C. § 2071 (local rules "shall be consistent with Acts of Congress.").

[10] W.D. Va. Loc. Adm. Proc. For Filing, Signing, and Verifying Pleading and Papers by Electronic Means at 12 (emphasis added). (App. 125a-126a.)

Adhering to this requirement is the only way a party can be bound to a specific document.

RHEM (and NLS) did not comply with this rule. They could not produce below any evidence to show that they satisfied the second requirement – the signature of counsel for NLS on the "Joint Notice of Removal." When called upon to produce a copy of the Notice containing the signature of counsel for NLS, they produced only an e-mail message from counsel for NLS expressing tentative approval of the content of a draft notice, contingent on further instructions from NLS's corporate officials. (App. 109a.) This wholly failed to meet the explicit requirement that the filing party (here, RHEM) "obtain the signatures of all attorneys on the document" before filing it electronically.[11]

Thus, NLS failed to file or sign a notice of removal in compliance with 28 U.S.C. § 1446. RHEM could not sign or file such a notice for NLS – especially after its thirty-day limit had expired. Even if RHEM somehow could have filed and signed a "joint" notice for other parties forty-three days after being served, here RHEM failed to follow the District Court's rules for

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[11] *Id.* at 12. Notably, the Administrative Procedures provide a ready means for a defendant to file a notice of removal showing the consent of a co-defendant represented by separate counsel in a manner that fully complies with 28 U.S.C. § 1446(a), by permitting a notice of removal to be signed in handwriting and filed on paper as an exception to the electronic filing rules. *Id.* at 6. (App. 124a.)

such filings.[12] The failure of all defendants to file a valid removal notice within thirty days of service, as required by 28 U.S.C. § 1446, cannot be cured, and Waytec timely raised the issue and preserved its objection to the District Court's exercising its removal jurisdiction. The District Court should have remanded the case, and the Fourth Circuit should have reviewed and corrected the District Court's erroneous failure to do so.

CONCLUSION

This case was never properly removed to Federal Court in the first instance, and Waytec preserved its objection. The uncured error should not be absolved under the Fourth Circuit's rationale that the failure to acquire federal jurisdiction somehow escapes appellate review. Numerous other Circuit Courts share the view that *Caterpillar* requires that they must ignore a preserved objection to non-compliance with the removal statute, so long as subject matter jurisdiction

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[12] This case is not controlled by *Becker v. Montgomery*, 532 U.S. 757 (2001), in which a *pro se* prisoner-litigant timely filed a notice of appeal, but attempted to "sign" his notice using a typewritten signature, was allowed to add a handwritten signature later and proceed. Here, counsel for NLS did not sign or file a notice of removal within a Congressionally-prescribed time period. Instead counsel for another party purported to file the document and sign it for NLS. NLS did not file and sign its own Notice of Removal until thirty-seven days after service. *Becker* cannot be read to permit counsel for one party to substitute his signature, after the fact, for the signature of counsel for another party, nor can such actions be squared with the strict construction of the removal statute's requirements. *Shamrock Oil*, 313 U.S. at 108-09.

exists at judgment. This interpretation of *Caterpillar* eviscerates Congressional directives on removal, and directly contradicts this Court's admonitions that removal statutes must be strictly construed because Federal Courts are courts of limited jurisdiction. As a result of this expansive and flawed reading of *Caterpillar,* Federal Courts, in the name of "judicial economy," are improperly assuming "default jurisdiction" over cases that properly belong in State Court. This Court should resolve the conflict.

For the foregoing reasons, Waytec asks that its Petition for Certiorari be granted and that the decision below be reversed and the case remanded to State Court.

Respectfully Submitted,

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